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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

Case No. 89-5961 (3)

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ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Is the application of Florida's jury override standard in an individual case subject to an Eighth Amendment review and, if so, what standard of review is applicable?

2. Is a valid constitutional claim procedurally barred when a defendant fails to raise it in state collateral proceedings, despite having raised it in the trial court and on direct appeal?

3. Can a harmless error analysis be applied to an erroneous jury instruction on a theory of defense which applies to one of the two prosecution theories of criminal liability?

4. May a prosecutor always cross-examine a defendant about the fact that he consulted with a lawyer during a recess in the trial, or should a prosecutor first be required to proffer a good faith basis for such an interrogation?

5. In a habeas corpus proceeding presenting multiple claims for relief, does an appellate court have jurisdiction to review an order of the district court that does not dispose of all of Petitioner's claims?



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Respondent, Richard L. Dugger, submits that Robert Lacy Parker's Petition for Writ of Certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals entered, on denial of rehearing, on August 17, 1989, should be denied.

## OPINION BELOW

The opinion of the Eleventh Circuit is reported as **Parker v. Dugger**, 876 F.2d 1470 (11th Cir. 1989).

We adopt the Petitioner's citation system as set forth in his petition.

## JURISDICTION

Mr. Parker's statement is accepted.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Parker's statement is accepted.

## STATEMENT OF THE CASE

### (i) Course of Proceedings

Robert Lacy Parker was convicted of two counts of first degree murder and one count of third degree murder, respectively, for his slaying of Richard Padgett, Nancy Sheppard and Jody Dalton.

For the Sheppard murder, Parker was sentenced to death. Parker received a life sentence for the Padgett murder and fifteen years (consecutive) for the Dalton murder.

The convictions and sentences were upheld in **Parker v. State**, 458 So.2d 750 (Fla. 1984). Certiorari was denied. **Parker v. Florida**, 470 U.S. 1088 (1985).

Mr. Parker filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. Relief was denied, Parker appealed, but lost. **Parker v. State**, 491 So.2d 532 (Fla. 1986).

Mr. Parker filed a petition for writ of statutory "habeas corpus" pursuant to 28 U.S.C. §2254. Mr. Parker was granted relief as to his sentence but was denied relief as to his conviction. Both parties appealed to the Eleventh Circuit.

The Eleventh Circuit reversed the District Court's decision granting relief as to Parker's sentence but affirmed the District Court's denial of relief as to the conviction. **Parker v. Dugger**, 876 F.2d 1470 (11th Cir. 1989). Rehearing was denied and this action ensued.

### (ii) Statement of the Facts

Although Mr. Parker disagrees with the factual conclusions reached by the Eleventh Circuit, the Respondent does not. The Respondent notes, however, that the Florida Supreme Court decision partially quoted by Mr. Parker also states:

> The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In light of these findings, the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. **Tedder v. State**, 322 So.2d 908 (Fla. 1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate.



**Parker v. State**, 458 So.2d 750, 754 (Fla. 1984).

Mr. Parker has offered five distinct issues. The facts relevant to each are set forth in order.

### (1) Facts: Question I
### (The jury override issue)

As noted by the Eleventh Circuit, the United States District Court granted habeas corpus relief to Mr. Parker by resentencing Mr. Parker under its own independent, reapplication of the judicially crafted "**Tedder** Rule".

The District Court attempted to justify its role as a "state sentencing court" by holding that the Florida Supreme Court's application of its rule was "broad" and "vague" and therefore arbitrary and capricious. The circuit court held:

> The district court decision suggests that its grant of relief was influenced by dissatisfaction with the Florida Supreme Court's application of the **Tedder** standard to the facts in this case. **Spaziano** warns, however, that federal review for the arbitrary or discriminatory imposition of the death penalty must not devolve into second-guessing the Florida courts on questions of state law particularly on whether the trial judge complied with the mandates of **Tedder**.

**Parker v. Dugger**, 876 F.2d 1470, 1475 (11th Cir. 1989).

Mr. Parker's petition lists certain factual averments he refers to as "mitigating factors". Although this Honorable Court is not a sentencing court, the Respondent would still note:

> (a) Mr. Parker was a leader of a small time drug-pushing operation and was not dominated by anyone, especially his employee and co-defendant, Tommy Groover. These murders were committed to terrorize Parker's debtors and enhance his reputation as a tough dope dealer. After Parker had Ms. Sheppard shot, he personally slit her throat. **Parker, supra**, at 1472.
>
> (b) Mr. Parker was not too drunk or too high to orchestrate the abductions and murders at bar or to form a precise or specific intent. These murders were committed to collect debts, scare other "deadbeats" and eliminate a potential witness. **Parker, supra**, at 1471.
>
> (c) As ring leader and as the man who slit Ms. Sheppard's throat, Parker's role was not "minor". **Parker, supra**.
>
> (d) Mr. Parker's youth or his favors to his friends had little relevance to his narcotics operation or his wanton disregard for human life.

(e) Mr. Parker's point (e) is pure speculation, not fact.

(f) Mr. Parker's employee, Tommy Groover, was sentenced to death for his role in the murder of one of the other victims. Parker's sentence was not disproportionate to Groover's. Co-defendant Long was under Parker's domination since, once before, Parker had actually shot Long. **Parker**, supra, at 1472.

(2) Facts: Question III
(**Stromberg** Claim)

Mr. Parker did not raise a specific "**Stromberg**" issue at trial or on direct appeal. At trial, he challenged the "sufficiency of the evidence", not the concept of "dual prosecution" (for premeditated and felony murder) of first degree murder. (T 2148-2149, 2264, 2274-2275).

Mr. Parker did not argue "**Stromberg**" on appeal, but rather offered this novel argument for the very first time in a motion for rehearing, which was summarily denied, without opinion.

(3) Facts: Question IV
(Duress Instruction)

Florida does not recognize "duress" as a defense to murder, so no jury instruction on "duress" was given (especially in the absence of any evidence of duress). (T 2093-2096).

Mr. Parker now seeks certiorari review on what he perceives as a misinterpretation of state law by the federal and state courts.

(4) Facts: Question V
(**Geders** Issue)

Mr. Parker testified on his own behalf at trial. His cross-examination (by the State) was interrupted by a dinner break. (T 1855-1856). During this recess, Parker conferred with counsel. (T 1963-1966).

When cross-examination resumed, the prosecutor properly questioned Mr. Parker on the issue of whether he had been "coached" during the recess. (T 1963-1966). Mr. Parker, in a supplemental memorandum of law, conceded that **Geders v. United States**, 425 U.S. 80 (1976), controlled the issue. (R 1, 17, 13-14).



(5) Facts: Question VI
(Jurisdiction)

Mr. Parker's statement is accepted.

We would note, as this Honorable Court is probably aware by now, that the United States District Court subsequently ruled on Mr. Parker's three remaining issues and that they are now presently before the Eleventh Circuit.

## REASONS FOR DENYING THE WRIT

### QUESTION I

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A DECISION OF THE CIRCUIT COURT WHICH FOLLOWS, AND APPLIES, A PRIOR DECISION OF THIS COURT

Mr. Parker's petition fails to address or satisfy the standards for obtaining certiorari review set forth in Rule 17.

The decision to abide by the express holding of **Spaziano v. Florida**, 468 U.S. 447 (1984), does not, for example, conflict with the decisions of any other circuit courts, with the Florida Supreme Court or with this Honorable Court. Nor does the opinion below decide an important issue of federal law which "has not been, but should be, settled by this Court." See Rule 17.

In **Spaziano**, this Honorable Court conducted a proper Eighth Amendment analysis of Florida's jury override procedures, but refused to engage in any resentencing of Mr. Spaziano, stating:

> The Florida Supreme Court reviewed petitioner's death sentence and concluded that the death penalty was properly imposed under state law. It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court. See **Barclay v. Florida**. . .

**Spaziano, supra**, at 467.

**Spaziano**, of course, followed **Barclay v. Florida**, 463 U.S. 939, 957 (1983), in which this Court held:

> These varied assertions seem to suggest that the Florida Supreme Court failed to properly apply its own cases in upholding petitioner's death sentence. The obvious answer to this question, as indicated in the previous discussion, is that mere errors of state law are not the concern of this Court.

**Barclay**, in its turn, relied upon this Court's decision in **Gryger v. Burke**, 334 U.S. 728, 731 (1948):

> His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.



Of course, in addressing the Eighth Amendment, this Honorable Court has already rejected the concept of federal resentencing on this basis. See **Wainwright v. Goode**, 464 U.S. 78, 84 (1983). The **Goode** court held:

> It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. **Engle v. Isaac**, 457 U.S. 1141, 73 L.Ed.2d 1361, 102 S.Ct. 3474 (1982); **Smith v. Phillips**, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982). Section 2254 is explicit that a federal court is to entertain an application for a writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." The Eleventh Circuit's ultimate conclusion was that the sentencing proceeding violated the Eighth Amendment, but it is critical to understand the reasoning it employed in reaching that result. It acknowledged that the federal constitution does not prohibit consideration of a defendant's future dangerousness. In fact, the court described the factor as "highly relevant to the purposes underlying capital sentencing." [citation] Nevertheless, future dangerousness was a nonstatutory aggravating circumstance that could not be relied upon to impose the death sentence without violating Florida law. Because the Court of Appeals was of the view that the sentencing judge had relied upon future dangerousness, the death sentence violated state law and was deemed arbitrary punishment under the Eighth Amendment.
>
> The difficulty with all of this is that the Florida Supreme Court had concluded that the trial judge had not improperly relied upon future dangerousness in imposing the death penalty. If the interpretation of the trial judge's remarks is deemed a legal issue, it is surely an issue of state law that the Court of Appeals should have accepted . . . If the Florida Supreme Court's conclusion that the death sentence was consistent with state law is accepted, the constitutional violation found by the Court of Appeals dissolves.

Mr. Parker strenuously argues for federal resentencing, despite the controlling law, on several grounds.

First, Parker complains that over the past seventeen years Florida capital sentencing decisions have evolved rather than remained fixed or inflexible. Parker's demand for legal rigidity does not compel certiorari review or even comport with common sense. Common law evolves. Capital cases cannot be held to a different standard.

Second, Parker disingenuously complains that "only" he received a death sentence and that he was only a bystander. Only Parker was sentenced to death for the Sheppard murder, but Mr. Groover, Parker's henchman, also received a death sentence for his actions that night. Parker, the ringleader, ordered and orchestrated all of the killings and, in the case of Ms. Sheppard, personally slit her throat. He was not a bystander and he was not singled out for a death sentence.

Given Mr. Parker's avoidance of Rule 17, the controlling law and the facts, it is obvious that his only hope of obtaining relief is by a plaintive request for resentencing on the basis of his perception of the facts. Certiorari was not created for that purpose and therefore relief should be denied.

QUESTION II

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A FINDING OF PROCEDURAL DEFAULT

No federal or state court has yet agreed with Mr. Parker that he raised his so-called "Stromberg" claim at trial or on appeal.

Mr. Parker's general challenge to the sufficiency of the evidence at trial did not preserve this issue for appellate review. Even if it could have preserved the issue, Mr. Parker never raised the issue on appeal in any way, shape or form.

After Parker lost his appeal, Parker raised the issue in a motion for rehearing. The Respondent is aware of no federal or state jurisdiction which approves of this tactic. Parker's request for rehearing, summarily denied without opinion, was not a merits ruling and cannot be represented as one in all candor.

There is no basis in law or fact for certiorari review.

QUESTION III

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A STATE COURT DECISION APPLYING STATE LAW GOVERNING JURY INSTRUCTIONS

Parker, as the leader of this drug dealing organization, orchestrated the murders at bar and, the record shows, was even



armed at times when his employees - Groover and Long - were not. Parker now says that his hirelings "coerced him" into ordering them to kill people to obtain money for Parker. This illogical theory not only defies common sense, it is contrary to Florida law.

Duress is not and never has been a defense to murder in the first degree in our state.

Parker alleged that Hall v. State, 187 So. 392 (Fla. 1939), recognized "duress" as a defense. It does not. Hall was a perjury prosecution, not a murder case, involving a non-party witness. Duress can be a defense to perjury, but not murder. Cawthon v. State, 382 So.2d 796 (Fla. 1st DCA 1980); Wright v. State, 402 So.2d 493 (Fla. 3rd DCA 1981).

Parker also tried to tell the lower courts that Chestnut v. State, 505 So.2d 1352 (Fla. 1st DCA 1987), recognized "duress" when in fact his "recognition" came from a dissenting opinion.

Parker concluded by misrepresenting that two other cases (a burglary case and a kidnapping case) upheld "duress" as a defense to murder.

In this Court, Mr. Parker has abandoned his Florida precedents and has alleged that Florida should have given him a jury instruction on "duress" simply because he wanted one, whether it was in accordance with the law or not. He then vainly tried to equate "duress" with "self-defense" and "cause of death" defenses. (Petitioner, page 20).

We submit that certiorari should not be granted simply to indulge arguments on Mr. Parker's theories of how state law ought to be changed. Again, Rule 17 does not provide for this kind of review.

Florida cannot be ordered to legitimize murder by "duress" (i.e., Parker's need to collect drug money and build a reputation), nor can it be compelled to give a "duress" instruction that would be totally devoid of evidentiary support.

Mr. Parker's request is not only untenable, it is nonsense.

## QUESTION IV

IT IS SUGGESTED THAT CERTIORARI NEED NOT BE GRANTED TO RENDER AN ADVISORY OPINION IN A SPECIFIC CASE

There is no disputing the fact that **Geders v. United States**, 425 U.S. 80 (1976), controls this case. Even Mr. Parker has conceded the point.

Mr. Parker, however, requests an advisory opinion setting out "rules" for any **Geders**-authorized cross-examination in the state courts.

Again, certiorari is not the appropriate forum. It is not a vehicle for obtaining advisory opinions or for the crafting rules of evidence that are purely mechanical in nature.

Absent any constitutional issue or other basis for review, certiorari should be denied.

## QUESTION V

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE PETITIONER'S JURISDICTIONAL QUESTION

The United States District Court granted Parker a writ of habeas corpus. Florida could not execute him.

Parker, oddly, now alleges that this order is somehow "not a final order" and that the District Court insulated its writ from all appellate review by declining to rule on three of his fifteen claims. Mr. Parker does not explain whether or not the State could have executed him or how the State could even have obtained review without the consent of the District Court.

Mr. Parker's peculiar hypothesis was only raised by Mr. Parker after he lost this appeal and his own cross-appeal. Nevertheless, the Circuit Court denied the claim and Mr. Parker can point to no conflict of decisional law or other reason to open this issue to review.

Incidentally, on remand the District Court decided the remaining three issues against Mr. Parker. Thus, the issue is really moot, unless Mr. Parker wants the Circuit Court to reopen the appeal and republish its opinion in a massive waste or judicial time and labor.



## CONCLUSION

Certiorari should not be granted.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Robert J. Link, Esq., HOWELL, LILES & MILTON, 233 East Bay Street, Jacksonville, Florida 32202, this 4th day of December, 1989.

MARK C. MENSER
Assistant Attorney General